

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 January 2006

BALCA Case No. 2004-INA-57
ETA Case No. P2002-CA-09517348/LA

In the Matter of:

A.L. HOME CARE,
Employer,

on behalf of

TERESITA MASAYON NIU,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Louis M. Piscopo, Esquire
Anaheim, California
For the Employer and the Alien

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This alien labor certification matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.¹

¹ This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on

STATEMENT OF THE CASE

On March 26, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Nurse Assistant. (AF 58-59). On May 12, 2003, the CO issued a Notice of Findings (NOF) indicating intent to deny the application. (AF 51-56). One of the grounds cited in the NOF relates to the question of whether the job description involved an impermissible combination of duties. The CO stated that he was in agreement with the Employment Service coding the occupation as Nurse Assistant. The CO found that the duties listed by the Employer for the position -- such as food preparation, food nutrition, menu planning, inspecting health hazards, equipment and furniture, washing and ironing clothes -- were not the duties of a Nurse Assistant as described in the Dictionary of Occupational Titles (DOT). The CO therefore found the job description to include an unduly restrictive combination of duties under 20 C.F.R. § 656.21(b)(2)(ii). To remedy the deficiency the CO gave the Employer the option to remove the restrictions and indicate willingness to test the labor market, demonstrate that the combination of duties was a business necessity, or provide evidence that the requirements were customary for the position.

In Rebuttal dated June 9, 2003, the Employer asserted that the offered position did not contain an impermissible combination of duties. (AF 17). The Employer argued:

The only job duty that is not specifically contained in the DOT, OES/SOC, or SWA² job descriptions is that requiring the employee to cook, as well as, feed and serve the residents. The DOT, OES/SOC, and SWA job descriptions contain expansive job duties that could reasonably be read to include this duty, especially since their descriptions assume the person works in a large medical facility or hospital which would have large kitchen staffs to cook for patients. Moreover, this is customary and

behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

² The Employer's reference to the "SWA" job description was probably intended to refer to the Service Contract Act ("SCA") job description, which is what the accompanying documentation shows. (See AF 29).

regularly performed by care givers at small (6 bed) residential care facilities like the Employers. Finally, as the attached California RCOC³ Direct Care Staffing Guidelines indicate, only one care staff is required to be on premises for the Employer's level of facility and the number of residents.

Id. The rebuttal indicates a willingness to retest the labor market. *Id.* A proposed advertisement stated that the job duties would include, *inter alia*, cooking, serving food to, and feeding residents. (AF 45). The ETA 750A was similarly amended. (AF 61).

The CO issued a Final Determination on August 15, 2003. (AF 13-15). The CO wrote:

Although the employer has amended the job duties, as described, the duties still contain a restrictive combination of duties of cooking and serving food. The NOF advised the employer that preparing and serving meals are not duties of a nurse assistant.

Outside counsel presented discussion that the only job duty that is not specifically contained in the DOT, OES/SOC, or SWA (sic) job descriptions is requiring the employee to cook, as well feed and service (food) to the residents. Counsel argues that these job descriptions contain expansive job duties that could reasonably be read to include cooking and serving meals/food. Further, counsel states that this (cooking and serving meals) is customary and regularly performed by care givers at small residential care facilities like the employer. Finally per the California RCOC Direct Care Staffing Guidelines, only one care staff is required to be on premises for this size employer (six beds/six residents). None of these assertions have been substantiated, however.

The duties contained in the above references do not imply that cooking and serving meals/food are duties of a nurse assistant. They clearly state that a nurse assistant serves and collects food trays. Furthermore, the California RCOC Direct Care Staffing Guidelines do not show a job description. It indicates one direct care staff is the minimum staffing required to be on premises; however, it does not show the direct care staff cooks and serves meals.

³ "RCOC" apparently stands for "Regional Center of Orange County."

The CO denied labor certification on this ground, and also based on a finding that the Employer did not establish that the position comprised a bona fide job opportunity that did not violate Federal, State or local laws.⁴

On September 17, 2003 the Employer submitted to the CO a document entitled Motion to Reconsider. (AF 2-12). The Employer asserted that the definition of Nurse Assistant found in the DOT is more consistent with duties performed in a large facility, not a small one as the Employer. Additionally, the Employer asserted that the position was misclassified as "Nurse Assistant" -- that instead it should have been classified as "Home Health Attendant." The Employer also repeated its argument that the expansive duties contained in the DOT could reasonably include the cooking and serving of meals, and therefore should not be considered restrictive duties that are not within the described duties of a Nurse Assistant. The Employer argued that according to the California Department of Social Services' Community Care Licensing Division, it is common practice to require food preparation and service at adult residential facilities, citing the CCLD Homepage at <http://cclld.ca.gov>.

The CO denied reconsideration on September 30, 2003, indicating that he could not find on the CCLD Homepage where it states that it is common practice to require food preparation and service at adult residential facilities, and that the argument that the DOT classification was wrong was a new argument and was in error even if it had been presented earlier. (AF 1).

The CO forwarded the case to this Board. The Board issued a Notice of Docketing on February 25, 2004. There is no record of the filing of a brief; however, the

⁴ The CO had raised this issue in the NOF because an Employment Contract presented early in the application process indicated that some of the Employer's residents were wheelchair bound and developmentally disabled. The Employer's business license presented on remand indicated that it was licensed to handle developmentally disabled -- but ambulatory -- residents. The Employer's amendments in the rebuttal to the ETA 750A and revised advertisement referred to duties involving pushing wheelchairs and assisting residents with walking. The CO's Final Determination, therefore, included a finding that the license was being violated. Because we affirm the CO on the combination of duties issue, we do not reach this aspect of the Final Determination.

Office of Administrative Law Judges received an e-mail on June 13, 2005, which states that the Employer filed an appeal on January 24, 2004.⁵

DISCUSSION

Under 20 C.F.R. § 656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that:

- 1) it normally employs workers to perform that combination of duties;
- 2) workers customarily perform that combination of duties; or
- 3) the combination of duties is based on a business necessity.

The CO must look to the correct DOT job title to ascertain a position's customary duties. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989). If an employer's job description lists duties which do not appear in any single DOT job description, then the petitioned position requires a combination of duties. *H. Stern Jewelers, Inc.*, 1988-INA-431 (May 23, 1990). If this is the case, the employer then bears the burden of establishing that the combination is customarily required for an occupation. If an employer is unable, or does not try to establish that a combination of duties is customary, employer bears the burden of establishing the business necessity of the combination. *H. Stern Jewelers, Inc.*

The Board in *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*) delineated the requirements to demonstrate a business necessity in a combination of duties. The Board in *Robert L. Lippert Theatres* held that an employer must document that it is necessary to have one worker perform the combination of duties in the context of

⁵ The Appeal File does not contain the Employer's request for review. Since the motion for reconsideration (which did not include a request for BALCA review) was denied on September 30, 2003, it appears that the request for BALCA review may have been untimely. The CO, however, did not file a brief or otherwise raise the issue of whether a timely appeal had been filed. In the interest of administrative efficiency we assume, *arguendo*, that an appeal was timely filed in this matter and decide this case on the merits rather than procedural grounds.

employer's business, including a showing of such level of impracticability as to make the employment of two workers infeasible. Implicit in this holding is a showing by the employer that reasonable alternatives such as part-time workers, new equipment and company reorganization are infeasible. A showing that the duties are essential to perform each other also helps to show business necessity, although such a showing is not necessary. An assertion of convenience or practicality is not enough to establish the business necessity of a combination of duties. *Robert L. Lippert Theaters, supra*.

The Employer in the instant case alleged in its rebuttal that the job description of a Nurse Assistant as found in the DOT was so expansive that it could be read to include a duty such as cooking meals. We, however, agree with the CO's Final Determination that the job descriptions cited by the Employer do not imply that cooking is a duty of a Nurse Assistant. The DOT definition for "Nurse Assistant," 355.674-014, includes the duty of "Serves and collects food trays and feeds patients requiring help." This reference cannot be interpreted to mean to prepare and cook meals.⁶ Therefore we find that the Employer required the Nurse Assistant to perform a duty not included in the DOT's definition of Nurse Assistant and a duty not normally required for the position.

The Employer's documentation does not substantiate its assertion that it is customary for care givers at small residential care facilities like the Employer to cook meals. We concur with the CO that the California guidelines providing that only one direct care staff member needs to be on the premises does not establish that the direct care staff also cooks.

The Employer's motion to reconsider presented new evidence and argument: (1) that the California Department of Social Services' Community Care Licensing Division web site indicates that it is common practice to require food preparation and service at adult residential facilities, and (2) that the classification of the job as a Nurse Assistant was in error. However, the Board stated in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)

⁶ The duty of serving meals, however, did not violate section 656.21(b)(2)(ii) if it merely involved serving and collecting food trays.

(en banc), "[u]nder the regulatory scheme of 20 C.F.R. Part [656], rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." Labor certification is denied where an employer files its rebuttal after the regulatory deadline with no excuses or justification offered. *Euroden*, 1992-INA-246 (June 2, 1993). Thus, this new evidence and argument was untimely presented. Moreover, the CO expressly stated in the NOF that he agreed with the state office's designation of the position as "Nurse Assistant;" the rebuttal did not challenge this finding.

Rather, the Employer's rebuttal was limited to an attempt to establish that the cooking requirement is a customary duty of Nurse Assistants in small residential care facilities. It presented no evidence or argument on whether business necessity supported the combination of duties. As a result, the Employer failed to rebut the finding that the position being offered consists of an unduly restrictive combination of duties.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.